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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

Petition of the Ameritech for Forbearance from )  
Dominant Carrier Regulation of its ) CC Dkt 99-65  
Provision of High Capacity Services in the )  
Chicago LATA )

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COMMENTS OF  
FOCAL COMMUNICATIONS CORPORATION  
AND KMC TELECOM, INC.

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## SUMMARY

The Ameritech request is one of several filed by Bell Operating Companies (“BOCs”) urging the Commission to deregulate their provision of special access services. Focal and KMC urges the Commission to deny the instant petition on the basis of one of the several deficiencies outlined in these comments that are shared by these petition. To the extent the Commission chooses to further consider pricing flexibility issues, it should do so in the *Access Reform Proceeding* rather than by repetitious and burdensome BOC forbearance petitions.

Ameritech has failed to show that it is non-dominant in the provision of special access service in Chicago. Ameritech’s assessment of competition in Chicago is based on self-serving and incomplete measures of competition that do not present an accurate picture of competitors presence in, or ability to serve Chicago. In reality, information from the Commission’s own *Local Competition Report* show that Ameritech and incumbent LECs continue to possess about 85% of the special access market. Ameritech also possesses a great advantage over competitors in terms of size and resources.

Because Ameritech has not shown that it is non-dominant in provision of special access services, it would not be in the public interest to grant the deregulation it seeks. Therefore, it has not met the standard for forbearance under Section 10 of the Act and the petition should be denied.

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**COMMENTS OF  
FOCAL COMMUNICATIONS CORPORATION  
AND KMC TELECOM, INC.**

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Focal Communications Corporation ("Focal") and KMC Telecom, Inc. ("KMC") respectfully submit the following comments in opposition to the above-captioned petition ("Petition")<sup>1</sup> filed by Ameritech requesting that the Commission forbear under Section 10 of the Communications Act of 1934, as amended,<sup>2</sup> from regulation of its provision of "high capacity services"<sup>3</sup> in the Chicago, Illinois local access and transport area ("LATA").

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<sup>1</sup> Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA (filed Feb. 5, 1999). *See Public Notice*, DA 99-334, CC Docket No. 99-65 (February 16, 1999).

<sup>2</sup> 47 U.S.C. Section 160. Section 10 was added to the Communications Act by the Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat. 56.

<sup>3</sup> Ameritech requests forbearance for its provision of special access, dedicated transport for switched access, and interstate intraLATA private line (point-to-point) services at DS1 and higher transmission levels. Petition n. 3.

**I. PRICING FLEXIBILITY ISSUES SHOULD BE ADDRESSED IN THE ACCESS REFORM PROCEEDING**

The Ameritech Petition is one of a series of "me too" petitions filed by the RBOCs requesting that the Commission forbear from price regulation of their provision of "high capacity" services.<sup>4</sup> These repetitive filings by the RBOCs do not provide a basis for efficiently resolving RBOCs current demands for deregulation in that it is difficult in terms of time, personnel, and resources for smaller carriers to effectively participate in the multiple filings that these petitions require.

All of these petitions are also similar in terms of the relief requested and for the services for which forbearance is requested, and additionally rely on similar arguments and showings, including reliance to some extent on the same consulting firm. They also share similar defects such as reliance on undisclosed company data, use of DS-1 equivalents to measure market share, requests for sweeping deregulatory relief, and failure to propose that a precondition of any pricing flexibility must be opening local service markets to competition. Focal and KMC urges

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<sup>4</sup> Petition of US WEST Communications, Inc., for Forbearance from Regulation as a Dominant Carrier in the Seattle, Washington, MSA (filed Dec. 30, 1998), *Public Notice*, DA 99-104, CC Docket No. 99-1 (January 4, 1999); Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas (filed Dec. 7, 1998), *Public Notice*, CC Docket No. 98-227 (December 8, 1998); Petition of the Bell Atlantic Telephone Companies for Forbearance from Regulation as a Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, DC; Vermont; and Virginia (filed January 20, 1999), *Public Notice*, DA 99-24, CC Docket No. 99-224. *See also* 1998 Biennial Regulatory Review -- Petition for Section 11 Biennial Review, Notice of Proposed Rulemaking, CC Docket No. 98-177, FCC 98-238, released November 24, 1998.

the Commission to summarily deny the Ameritech petitions on the basis of these deficiencies as further discussed in these comments. To the extent the Commission chooses to further address pricing flexibility issues, it should do so in the *Access Reform Proceeding* - the proceeding that it established to consider ILEC requests for pricing flexibility in the first place. This will provide a vehicle for the Commission to address pricing flexibility issues without the unnecessary, duplicative, and burdensome filings these forbearance petitions represent.

## **II. AMERITECH HAS NOT SHOWN THAT IT IS NON-DOMINANT IN PROVISION OF "HIGH CAPACITY" SERVICES IN CHICAGO**

In determining whether a carrier has market power, the Commission has considered several factors: market participants, market share, supply and demand elasticities, and the carrier's size and resources.<sup>5</sup> Ameritech has failed to show that it lacks market power under these factors.

Market Participants. In support of its claim that the special access market in the Chicago LATA is competitive, Ameritech describes its competitors in Chicago in general terms. Fcoal and KMC submit that it is not possible to draw any conclusions from these generalized, unsupported descriptions concerning the extent to which competitors are actually providing service in Chicago.

Ameritech also provides the fiber miles some of its Chicago competitors have installed, the number of buildings in which some have installed facilities, or the revenues of some of these

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<sup>5</sup> *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*").

competitors.<sup>6</sup> However, this information provides little basis on which to assess Ameritech's market power in Chicago because Ameritech has failed to provide the fiber miles Ameritech has installed or the buildings it reaches in Chicago. Focal and KMC believe that Ameritech did not submit this information because it would show that Ameritech continues to possess an overwhelming advantage in the deployment of facilities in Chicago comparison to its competitors. Focal and KMC note that according to FCC figures, incumbent LECs have more than seven times the fiber miles in place than new entrants, and added to their existing fiber facilities in 1997 as much fiber miles as new entrants installed in that year.<sup>7</sup> Accordingly, based on the best available information, incumbent LECs continue to possess an overwhelming advantage in terms of deployed fiber and Ameritech's presentation on fiber miles in Chicago could not warrant a conclusion that Ameritech lacks market power in provision of high capacity services in Chicago. Ameritech's information concerning revenues of its competitors is irrelevant to an assessment of Ameritech's market power in Chicago since Ameritech provides the nationwide revenue for these carriers which says nothing about revenues earned in the Chicago LATA.

Market Share. Ameritech contends that competitors have captured 94% of the retail market for high capacity services in Chicago.<sup>8</sup> However, as acknowledged by Ameritech, this

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<sup>6</sup> Petition p. 11-14.

<sup>7</sup> *Local Competition*, Industry Analysis Division, Common Carrier Bureau, December 1998, Chart 2.1.

<sup>8</sup> Petition p. 14.

includes providers who resell Ameritech special access services.<sup>9</sup> Focal and KMC submit that as long as Ameritech continues to provide the facility it will be able to exert market power in provision of high capacity services by setting prices for the underlying telecommunications service purchased by resellers, making technical decisions that affect the quality of service, and determining where facilities, and therefore service, can be provided. The Commission should therefore not give any serious weight in assessing special access market share in Chicago to the claim that competitors possess 94% of the retail market.

Ameritech also claims that competitors share of special access facilities is 49% based on "DS-1 equivalents."<sup>10</sup> As explained below, DS-1 equivalents do not provide a realistic basis for assessing market share. Instead, the Commission should assess the state of competition in the Chicago LATA on the basis of more complete information including comparative revenues and numbers of customers served and other information. Focal and KMC believe that Ameritech and the other RBOCs in their various "me too" petitions have avoided presenting revenue and customer figures because this would show that they continue to possess the overwhelming share of the market. The FCC's most recent *Local Competition Report* shows that new entrants provide only 13.6 percent of total special access and local private line services provided to other carriers and 6.3% of such services provided to end users, based on percentage of nationwide revenues.<sup>11</sup> Since RBOCs are claiming that most of their high capacity demand

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<sup>9</sup> Petition p. 14.

<sup>10</sup> Petition p. 15.

<sup>11</sup> *Local Competition Report*, Industry Analysis Division, Common Carrier Bureau, December 1998, Table 2.3



and competition is located in major metropolitan areas, the revenue figures for Chicago should not be very different than these national figures. Indeed, the *Local Competition Report* suggests that this would be the case.<sup>12</sup> Accordingly, there is no basis presented in Ameritech's petition for concluding that competitors have 49% of the facilities-based special access market in Chicago.

The Commission should also reject as providing any guidance the various court cases cited by Ameritech purporting to stand for the proposition that "courts virtually never find monopoly power when market share is less than 50%."<sup>13</sup> These cases concern industries such as food distribution and health insurance providers in which the operative presumption is that these providers are not monopolies, and never have been, and in which the burden is to prove market power, not the other way around. Here, given that Ameritech has exercised market power for many years, the operative presumption is that it continues to possess market power unless demonstrated otherwise. Focal and KMC submit that a market share of less than 50% could be consistent with a finding that Ameritech continues to possess market power during a transition to competitive markets. The Commission should reject the view that a market share of less than 50% automatically requires a finding of non-dominance.

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<sup>12</sup> "[These percentages] reflect the fact that CAPs concentrated on providing special access services to business customers when they first entered the market and that these services continue to represent significant parts of their business." *Local Competition Report*, p. 10.

<sup>13</sup> An Analysis of Market Power in the Provision of High-Capacity Access in the Chicago LATA in Support of Ameritech's Petition for Section 10 Forbearance, Dr Debra J. Aron ("Aron report"), p. 21.

The Commission should also reject the view that new entrants share of growth is more indicative of market share than is "static" market share.<sup>14</sup> Apart from the fact that Ameritech's estimates of new entrants share of growth are also based on DS-1 equivalents, this argument is little more than a concession that new entrants do not yet have a significant share of the total high capacity market in Chicago. Even if correct that new entrants are gaining a significant share of most new business, the time period in which this may have been happening is too brief to warrant any conclusions concerning Ameritech's market power. Moreover, this would not show that Ameritech does not continue at this time to possess the overwhelming share of the high capacity market in Chicago and, therefore, possesses market power.

Demand and Supply Elasticity. Ameritech's contentions concerning demand and supply elasticities consist of unsupported generalized allegations that do not provide probative evidence that customers can readily switch to other providers or that new providers can readily provide service to such customers. Moreover, contrary to Ameritech's contention, special access customers cannot readily switch to new entrants. Ameritech's own contract arrangements and tariff penalties foreclose customers' ability to switch to other providers. Further, the fact that special access customers may be large sophisticated customers that employ technical experts and engage in planning does not translate into an ability to readily switch access and transport services to new entrants. While Ameritech states that AT&T and MCI-Worldcom together account for 60% of current demand for high capacity services in the Chicago LATA, Focal and KMC submit that if it were desirable to do so and if it were easy to switch to other carriers or

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<sup>14</sup>

Petition p. 16.

their own networks they would have already done so.<sup>15</sup> The reality is that these and other customers of special access remain dependant on the ubiquity of Ameritech facilities in the Chicago LATA. Ameritech's unsupported allegations of the ability of customers to switch does not disprove this reality.

In addition, Ameritech has seriously overestimated the ability of competitors to readily provide service to new customers in Chicago. While it claims that competitors can extend facilities to new buildings for as little as \$6,200,<sup>16</sup> the cost of extending facilities to a building is only part of the costs of serving new customers. Thus, in connection with Bell Atlantic's forbearance petition, AT&T has pointed out that the cost of extending service to a building plus other costs is more likely to be in the range of \$250,000, at least in New York City.<sup>17</sup> Moreover, these costs are likely to be far greater than the costs Ameritech experiences in providing service to new customers. With facilities in place to nearly every building, its costs of providing service to customers will be far less than new entrants. Therefore, Ameritech possesses a very significant cost advantage in comparison to new entrants.

The Commission should not give significant weight to Ameritech's argument that competitors facilities are collocated in wire centers representing 87% of its high capacity revenues and more than 94% of its special access local distribution channels.<sup>18</sup> The fact that competitors have obtained collocation does not show that they are able to readily serve new

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<sup>15</sup> See AT&T Opposition, CC Docket No. 99-24, filed March 18, 1999, p. 12.

<sup>16</sup> Aron Report p. 28.

<sup>17</sup> AT&T Opposition, CC Docket No. 99-24, filed March 18, 1999, p. 10.

<sup>18</sup> Petition p. 20.

customers. Too many other factors can prevent collocated carriers from providing service to justify Ameritech's unwarranted assumption that collocation at a central office where Ameritech provides service is equivalent to being able to serve Ameritech's customers. These factors include the availability of additional collocation space to already collocated or new competitors, the ability to obtain key Section 251 network features and elements free from unreasonable restrictions and delays, and with adequate pricing. Thus, collocation does not show competitors can readily expand to provide new services.

Ameritech has also ignored the fact that until such time as it fully opens its markets to competition there will be substantial barriers to entry or provisioning of new service by competitors. As long as competitors are dependent on inadequate provision of OSS, slow or unavailable collocation or provisioning of unbundled network elements ("UNEs"), there will be significant barriers to entry. Focal and KMC submit that there is no basis for finding that there are no barriers to entry or that there are significant elasticities of supply and demand that could operate to eliminate Ameritech's market power until such time as Ameritech has fully opened its markets to competition.

Ameritech's claim that the capacity of competitors' fiber is sufficient to serve all of Ameritech's demand is meaningless.<sup>19</sup> While the capacity of fiber is large as a technical matter, this does not show that competitors can actually readily make that capacity available to customers. Rather, as noted, new entrants face a host of cost and practical difficulties that hinder their ability to serve new special access customers, in contrast to Ameritech.

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<sup>19</sup>

Petition p. 20.

Ameritech's Size and Resources. It is also evident that Ameritech's size and resources dwarf those that competitors can bring to bear in the local market. By any objective measure Ameritech is a giant compared to new entrants in the local service market. As noted, incumbent LECs have deployed seven times as much fiber as new entrants.<sup>20</sup> Incumbent LECs additionally had 55 times the telecommunications revenues as CAPs and CLECs in 1997.<sup>21</sup> In Illinois, as of June 30, 1998 Ameritech had 7,348,000 switched access lines whereas new entrants were using only 14,000 UNEs.<sup>22</sup> While some competitors are large customers, they do not have the ability to deploy the facilities and personnel in any given local market that Ameritech possesses by virtue of its status as the incumbent LEC. Therefore, Ameritech's size and resources preclude a finding of non-dominance.

Accordingly, Focal and KMC submit that Ameritech has not justified a finding of non-dominance by reference to the factors that the Commission has used in previous cases and that must form the underpinnings of any such finding.

### **III. THE POTENTIAL FOR COMPETITION DOES NOT JUSTIFY FORBEARANCE**

An unstated theme that runs throughout Ameritech's petition is that there is a potential for significant competition in the Chicago LATA and that this justifies forbearance. Thus, as noted, it contends that AT&T and MCI WorldCom currently account for 61% of its special

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<sup>20</sup> See n.11, *supra*.

<sup>21</sup> *Local Competition*, Industry Analysis Division, Common Carrier Bureau, December 1998, Table 2.2

<sup>22</sup> *Local Competition*, Industry Analysis Division, Common Carrier Bureau, December 1998, Chart 2.1.

access demand and that they could self-provision this service.<sup>23</sup> It also contends that competitors are collocated in wire centers from which Ameritech serves a large percentage of its special access demand.<sup>24</sup> Similarly, it describes competitors facilities and alleges that these have the capacity to serve virtually all Ameritech's special access demand.<sup>25</sup> And, it contends that resellers who currently are dependent on Ameritech facilities to provide special access services could soon transfer these customers to their own facilities.<sup>26</sup>

Focal and KMC submit that the specter of competition that Ameritech is so concerned about does not warrant forbearance. Rather, in order to justify immediate relief, Ameritech must show an actuality of significant competition such that it no longer possesses market power at the present time. As discussed, Ameritech presents market share based on self-serving estimates based on DS-1 equivalents and withholds comparisons that would likely show that Ameritech continues to possess an overwhelming share of special access and transport revenues, facilities, and customers. Until the situations cited by Ameritech actually occur, there can be no basis for finding Ameritech non-dominant in provision of "high capacity" services in Chicago.

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<sup>23</sup> Petition p. 13.

<sup>24</sup> Petition p. 20.

<sup>25</sup> Petition p 20.

<sup>26</sup> Petition p. 15.

#### **IV. DS1 EQUIVALENTS DO NOT PROVIDE AN ADEQUATE BASIS FOR ASSESSING COMPETITION**

Focal and KMC submit that DS-1 equivalents do not provide an accurate or complete picture of the state of competition in a given market. A DS-3 service is equivalent to 28 DS-1s. Thus, a 50% market share could be achieved on the basis of DS-1 equivalents when a competitive LEC is providing one DS-3 circuit to one customer in one building in an area and Ameritech is providing 28 DS-1s to 28 separate customers in that area. At the same time, rates for DS-3 service are not 28 times the rates for DS-1 service. Therefore, Ameritech could continue to be enjoying the lion's share of revenues for DS-1 equivalent channels even though competitors could be providing a significant percentage of DS-1 equivalent capacity. It is no accident that Ameritech and its consultants have not provided comparative customer or revenue figures. Focal and KMC submit that these comparisons would show Ameritech is the dominant provider of special access services in its region. Focal and KMC believe that any estimate of the state of competition must be based on a more complete picture of market presence than the self-serving and gross measure of DS-1 equivalents.

#### **V. FORBEARANCE COULD NOT BE JUSTIFIED ABSENT COMPLIANCE WITH THE MARKET OPENING PROVISIONS OF THE ACT**

In the *Access Reform Proceeding*, the Commission envisioned a phased approach to pricing flexibility in which some pricing flexibility could be granted as soon as incumbent LECs have demonstrated that they have opened their markets to competition measured by reference to some appropriate test.<sup>27</sup> Later, when actual, substantial competition had developed greater

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<sup>27</sup> *Access Reform NPRM*, para. 163.

pricing flexibility could be granted up to and including forbearance of the type envisioned by Ameritech in this proceeding.

Ameritech's request for forbearance conveniently ignores the Commission's phased conception of the basis for establishing pricing flexibility and any obligation on its part to comply with the key interconnection, unbundling, resale and other obligations of the 1996 Act designed to achieve local service competition. Ameritech has ignored this point since it is a long way from complying with an objective measure of opening its markets to competition such as Section 271 of the Act. Accordingly, Ameritech's Petition represents an effort to obtain price deregulation far in advance of the time when it would be appropriate to be granted.

#### **VI. THE PETITION SHOULD NOT APPLY TO DSL SERVICE**

The Commission recently determined that DSL service is a special access service.<sup>28</sup> Thus, DSL service could fall within the scope of Ameritech's request for deregulation of special access services in the Chicago LATA.

However, the Ameritech petition does not mention DSL service or present any showings with respect to it. Moreover, there are a number of issues concerning DSL that are distinct from special access services. DSL service is frequently offered directly to consumers. Focal and KMC submit that price deregulation of a consumer service would require a far more substantial and probative showing of non-dominance than that offered by Ameritech.

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<sup>28</sup> GTE Tel. Operating Cos. GTOC Transmittal No. 1148, CC Docket No. 98-79, FCC 98-292, Memorandum Opinion and Order (rel. October 30, 1998).



In addition, DSL service is a current focus of the Commission's efforts to promote the provision of advanced services.<sup>29</sup> The Commission should be sensitive to the probable consequences of deregulation of Ameritech's provision of DSL service to the achievement of the Commission's advanced services goals. In particular, DSL is a relatively new service that competitors are just beginning to provide. At the same time, incumbent LECs are attempting to thwart competitors efforts to provide DSL by refusing to provide the conditioned loops and subloop unbundling or to permit loop spectrum sharing that are necessary for provision of DSL service. Focal and KMC submit that, apart from concerns about deregulation of longstanding special access services, it would be very ill-advised to deregulate a new service before new entrants have any market share and safeguards are not in place to assure that incumbents provide new entrants necessary underlying network elements. For these reasons, if the Commission were to grant the Ameritech petition in any other respect it should not do so with respect to DSL service.

## **VII. THE AMERITECH PETITION FAILS TO MEET THE STATUTORY STANDARD FOR FORBEARANCE**

Under Section 10(a) of the Communications Act, the Commission must forbear from enforcing a regulatory requirement if (1) enforcement of such regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable; (2)

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<sup>29</sup> See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, released August 7, 1998 ("Section 706 NRPM").

enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.<sup>30</sup>

Focal and KMC submit that the Commission could not make these findings in this case. First, for the reasons discussed, Ameritech has not shown that it lacks market power in provision of high capacity services that would enable the Commission to rely on market forces, rather than regulation, to assure that prices for high capacity services are reasonable. In addition, the Commission could not conclude that forbearance would be consistent with the public interest. Absent compliance with the market opening provisions of the Act, it would not be in the public interest to substantially deregulate incumbent LECs because there would be no assurance that they could not engage in conduct that would thwart competition. Accordingly, the Commission must deny Ameritech's request for forbearance.

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<sup>30</sup>

47 U.S.C. Sec. 160(a).

## VIII. CONCLUSION

For these reasons, Focal and KMC urge the Commission to deny Ameritech's request for forbearance from dominant carrier regulation for provision of special access services.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell M. Blau", written over a horizontal line.

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## CERTIFICATE OF SERVICE

I, Candise M. Pharr, hereby certify that on this 31st day of March, 1999, I served a copy of the foregoing Comments of Focal Communications Corporation and KMC Telecom, Inc. by hand delivery or first-class mail on the following active parties:



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